No. 112, Original

In The Supreme Court of the United States

October Term, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

RESPONSE TO MOTION TO DISMISS

JOSEPH B. MEYER
Attorney General of Wyoming
Counsel of Record

MARY B. GUTHRIE
Senior Assistant Attorney General

VICCI M. COLGAN
Senior Assistant Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

September, 1988

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MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

On June 30, 1988, the Court accepted the complaint filed by the State of Wyoming in this matter and allowed the defendant State of Oklahoma sixty days within which to file an answer. In its complaint and accompanying brief Wyoming offered two bases to support original jurisdiction: 1) that Wyoming had experienced a decline in coal severance tax collections because of Oklahoma legislation which mandates the use of Oklahoma produced coal and 2) that citizens of Wyoming had also suffered substantial economic injury due to the operation of the Oklahoma law.

On August 30, 1988, the State of Oklahoma filed a Motion to Dismiss and Brief in Support of the Motion of Dismiss, in lieu of filing an answer. The thrust of Oklahoma's motion is that Wyoming has no standing because it has not been injured by Oklahoma legislation which requires that at least ten percent of coal burned in Oklahoma utilities be mined in Oklahoma, OKLA. STAT. tit

45, §939 (Supp. 1986), (the Act) that Wyoming cannot proceed in *parens patriae*, and that the case should properly be heard in another forum.

This case is an appropriate action in which the Court should exercise its original jurisdiction, because the State of Oklahoma in enacting economic protectionist legislation has inflicted a substantial and serious injury on the State of Wyoming and its citizens. This case is the kind of suit which exemplifies the reason for permitting the Supreme Court to resolve controversies between states; the essence of federalism is implicated in this case. Additionally, the State of Wyoming has no other forum in which to challenge legislation which unreasonably burdens interstate commerce. For these reasons Wyoming requests this Court to deny Oklahoma's motion to dismiss.

ARGUMENT

I. THIS COURT HAS ALREADY DETERMINED THAT OKLAHOMA'S ARGUMENTS ARE WITHOUT MERIT.

The arguments raised by Oklahoma have already been exhaustively discussed in its Brief in Opposition to Motion for Leave to File Complaint. Those arguments were obviously rejected on June 30, 1988 when the Court granted Wyoming leave to file its complaint.

In filing its motion to dismiss, the State of Oklahoma will only prolong resolution of a matter of great importance to the State of Wyoming. To allow Oklahoma to delay the proceedings is inappropriate and does not reflect the view that the object of original cases is to have the parties reach and argue the merits of the controversy as soon as possible. *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). This

Court should summarily dismiss Oklahoma's motion, because "procedures governing the exercise of our original jurisdiction are not invariably governed by current rules of civil procedure." *Id.* at 644.

In its Motion for Leave to File a Complaint and accompanying brief, Wyoming detailed its justification for requesting that the Court decide this case. (See Brief, pp. 18-24). Therefore, this response will supplement the arguments already presented, rather than repeating them.

II. THE COURT PROPERLY ACCEPTED JURISDICTION OF THIS CASE BECAUSE WYOMING HAS SUFFERED A SERIOUS AND SUBSTANTIAL INJURY DIRECTLY CAUSED BY THE OKLAHOMA LEGISLATION.

Oklahoma argues that Wyoming has no standing because it has not been directly injured by the Oklahoma legislation. However, an examination of the facts set forth in the complaint and the decisions upon which Oklahoma relies will demonstrate that Oklahoma's argument must fail.

To obtain original jurisdiction in this Court, as provided for in article III, §2, cl. 2 of the United States Constitution, the complaining state must have "suffered a wrong through the action of the other State, furnishing ground for judicial redress." *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). The injury must be traced to the defendant's action, rather than the independent action of a third party. *Maryland v. Louisiana*, 451 U.S. 725, 736 (1981). Those tests are met here.

The instant case is similar to cases in which the Court accepted original jurisdiction. There is a direct issue between states. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). The States of Wyoming and Oklahoma are

undeniable adversaries because of the Oklahoma Act. *California v. Texas*, 457 U.S. 164 (1982). The validity of a state statute is being challenged. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Maryland v. Louisiana*, 451 U.S. 725 (1981).

In many ways the issue presented in this case is not unlike that presented in *Maryland v. Louisiana*, 451 U.S. 725 (1981), in which this Court granted jurisdiction. In that case, the question was raised whether a "First Use" tax imposed upon the consumers of natural gas processed in Louisiana violated the commerce and supremacy clauses of the Constitution. Because Maryland was found to be directly affected by the tax, the Court found that it had been injured and had standing to bring the action. In the instant case, the commerce clause is also implicated because Oklahoma's protectionist legislation has caused direct injury to Wyoming. The State of Wyoming is not a nominal party in this conflict; it has received less severance tax monies because the Act has resulted in less coal being sold to Oklahoma utilities.

The complaint filed by Wyoming alleges that Oklahoma utilities purchased over ten million tons of Wyoming coal in 1986. The complaint also alleges that Wyoming derives significant severance tax revenues from the sale of Wyoming coal to Oklahoma coal-fired plants, and that Wyoming producers sell a large portion of Wyoming coal in interstate commerce. The State of Wyoming's supporting brief makes it clear that severance tax receipts are disbursed through a statutorily mandated procedure. These tax revenues are disbursed to the general fund to run state government, to the water development fund, to the highway fund and to counties and municipalities.

It is difficult to understand the State of Oklahoma's assertion, unsupported by any factual statements, that

Wyoming is not injured by the Act. The State of Oklahoma argues that the State of Wyoming's injury is attenuated because Wyoming is not a producer or a consumer of coal. Oklahoma further suggests that Wyoming producers could easily sell their coal to other users. These arguments are not true and are without merit.[1]

The State of Wyoming's injury can "fairly be traced to the defendant." *Maryland v. Louisiana*, 451 U.S at 736. The diminution of Wyoming's tax revenues results from the action of the State of Oklahoma. Indeed, it is difficult to think of a more direct injury to a state than a reduction in its tax revenues.

The Defendant relies on a variety of decisions other than *Maryland v. Louisiana, supra,* in its attempt to support its motion; however, virtually all of the cases cited differ from the instant case.

This matter does not involve private litigants and it does not present the Court with a recurring controversy and state concerns, as found in *Illinois v. Michigan*, 409 U.S. 36 (1972). Rather, the instant case involves a controversy between two states with federalism concerns. It does not involve a matter in which the State of Wyoming has inflicted some harm on itself, as in *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), nor does it involve a valid state

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[1] There has been a significant decline in the production of coal in Wyoming since the enactment of the Oklahoma Act. (See Affidavit of Randolph Wood, director of Department of Environmental Quality, State of Wyoming, Appendix, A-1).

An oversupply of coal created by loss of sales means that Wyoming producers must sell their coal, if at all, at significantly lower prices than provided for in original contracts. If there are fewer coal sales at a lower price, obviously, less severance tax will be collected by the State of Wyoming. (See Affidavit Seth Schwartz, Appendix A-5.)

statute which is not properly administered, as was the situation in *Louisiana v. Texas*, 176 U.S 1 (1900). Real harm has been done to Wyoming by the operation of the Oklahoma statute, unlike *Arizona v. Alabama*, 291 U.S. 286 (1934), in which there was no showing that a statute which forbade the import of convict-manufactured goods actually affected the complaining states. In *Arizona v. New Mexico*, 425 U.S. 794 (1976), this Court refused to hear a complaint filed by Arizona because it determined that the New Mexico statute would only affect Arizona residents. However, in the instant case the Oklahoma statute, especially if its protectionist approach is followed by other mineral producing states weakened by hard econonic times, has a great potential to affect other states as well. The subject matter is not trivial, as opposed to *California v. West Virginia*, 454 U.S. 1027 (1981).

The State of Wyoming recognizes that this Court has on several occasions observed that original jurisdiction should be sparingly granted, so that the Court can devote its energies to appellate work. *Washington v. General Motors Corp.*, 406 U.S. 109, 113 (1972). However, this case presents the kind of suit which should be heard by the Court.

III. THE STATE OF WYOMING HAS STANDING TO CHALLENGE THE OKLAHOMA ACT AS *PARENS PATRIAE* OF ITS CITIZENS.

In addition to pleading that it had been substantially injured by the Oklahoma Act, the State also pleaded that it had standing as *parens patriae* to bring the action on behalf of its citizens.

This Court has often recognized that a state may act as representative of its citizens in original actions where the

alleged injury affects the general population of a state in a substantial manner. *Maryland v. Louisiana*, 451 U.S. at 739. All of the citizens of Wyoming have been affected by the reduction in severance tax payments, which is directly attributable to the Act. These monies are used to finance the construction of highway and water development projects; they are deposited in the state's general fund, to be used for the operation of government; they may be used to fund Worker's Compensation; they are used for governmental construction of public works. All of these uses affect the general population of the State in a substantial manner.

Wyoming should be allowed to bring this action as *parens patriae* because the Oklahoma Act "limits the opportunities of her people, shackles her industries, retards her development and relegates her to an inferior economic position among her sister states." *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 451, *reh'g denied* 324 U.S. 890 (1945). Wyoming is appropriately representing her citizens as *parens patriae* in order to prevent further harm to its quasi-sovereign interests. *Hawaii v. Standard Oil*, 405 U.S. 251, 257-258 (1972).

IV. THERE IS NO OTHER FORUM IN WHICH THE STATE OF WYOMING COULD LITIGATE THIS CASE.

28 USC §1251(a), provides that "the Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." Consequently, the State of Wyoming has no other forum in which to resolve this issue.

Oklahoma argues that a challenge to the Oklahoma Act could be brought by affected coal producers in a state court proceeding. However, such an argument fails to

recognize that the interests of the State of Wyoming are dissimilar from and conflict with those of coal producers which must pay coal severance taxes to the state. The focus and emphasis of a state and its taxpayers are not identical. Coal producers doing business in Oklahoma could, for a variety of reasons, including fear of political reprisal, choose not to challenge the Act. Nowhere in its motion or brief does Oklahoma allude to any pending court challenges to the Act.

This Court does not automatically consign a request for original jurisdiction to oblivion because a state action could be filed or is pending. In *Maryland v. Louisiana*, the Court granted jurisdiction, even though state court actions were pending, and observed that whether original jurisdiction should be exercised when identical issues are raised in a pending suit in another forum is a proposition that must be determined on a case by case basis. 451 U.S. at 743.

If a pending state court proceeding could completely address Wyoming's concerns, then it might be appropriate for the Court to refuse to hear this case. *Arizona v. New Mexico*, 425 U.S. 794 (1976); *Massachusetts v. Missouri*, 308 U.S. 1, 19-20 (1939). In this case where no other action is pending, and where any action which might be brought by coal producers would not necessarily represent the interests of the State of Wyoming, original jurisdiction should be retained.

CONCLUSION

The Court should decide this case on its merits. In *California v. Texas*, 457 U.S. 164, 168 (1982), the Court observed that for a case to be worthy of original jurisdiction, one must consider the seriousness and dignity of the claim, and the availability of another forum with jurisdic-

tion over the parties where issues may be litigated and where appropriate relief may be had.

All of the tests set forth in *California v. Texas* are satisfied. The question of whether one state is unduly burdening interstate commerce is a serious and dignified matter. The State of Wyoming has nowhere else to litigate this matter. Relief in the form of invalidating the Act is available.

The State of Wyoming has been affected in a real and substantial manner because of the enactment and operation of the Oklahoma Act. The State of Oklahoma should not be permitted to dispose of this important matter on procedural grounds.

The motion to dismiss filed by the State of Oklahoma should be denied, and the case decided on its merits in a summary manner.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming
Counsel of Record

MARY B. GUTHRIE
Senior Assistant Attorney General

VICCI M. COLGAN
Senior Assistant Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

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October Term, 1987

STATE OF WYOMING,

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Defendant.

AFFIDAVIT OF SETH SCHWARTZ

I, Seth Ira Schwartz, being first duly sworn, state as follows:

1. I am a principal of the consulting firm named Energy Ventures Analysis, Inc. (EVA), which is located at 1901 North Moore Street, Suite 1200, Arlington, Virginia 22209. I graduated from Princeton University in 1977 with a BSE in Geological Engineering, and have been a principal in EVA since its inception in 1981.

2. The largest portion of EVA's work is the economic analysis of the coal industry for a variety of clients, including coal companies, electric utilities, state and federal agencies, railroads, and others with direct or indirect interests in the coal industry. Typical EVA projects in analyzing the coal industry include long-term forecasts of coal demand by market and customer, long-term studies of regional coal supply and prices, coal market analyses in support of mine development or acquisitions, production

cost analyses of individual mines and of coal supply regions, strategic planning for coal companies and electric utilities, and the review of electric utility coal procurement practices. EVA also provides expert testimony in a number of state and federal court cases as well as arbitration concerning coal-related issues such as coal contract interpretation, coal market prices, and damages associated with these areas. I have personally been involved in either an analytical or management role in most of EVA's projects in these areas.

3. My work analyzing the coal industry and coal markets has been national in scope, and includes a number of projects related to the market for Wyoming coal. Within the last year, I have performed supply and demand studies for Powder River Basin coal for two utility customers, and one similar market study for a producer of this coal. I have also performed recent studies of the market for south Wyoming coal for two producers and a railroad. Either I or one of my partners have testified as experts in five separate court cases regarding litigation over Wyoming coal contracts.

4. Like much of the coal industry, Wyoming coal producers have large excess production capacity. This is due to the construction of many new mines in the 1970's in response to forecasts of high demand growth, and the subsequent actual growth being less than forecast. Producers in the Wyoming portion of the Powder River Basin (where the coal currently shipped to Oklahoma is mined) have existing annual production capacity of 186.4 million tons versus actual 1987 coal production of only 127.1 million tons. The planned annual production capacity at these 17 mines is about 282 million tons. The South Wyoming mines have an even higher percentage of excess capacity.

5. As a result of this excess capacity, the Wyoming coal producers are aggressively selling their product to any and all potential customers. The loss of any market cannot be replaced by other coal sales because the Wyoming producers are selling this coal anyway. In my opinion, the loss of sales of Wyoming coal to Oklahoma customers cannot be replaced by sales to other markets.

FURTHER AFFIANT SAITH NAUGHT.

/s/ *Seth Schwartz*

STATE OF VIRGINIA)
) ss.
COUNTY OF ARLINGTON)

The foregoing instrument was subscribed and sworn to before me this 27th day of September, 1988, by Seth Schwartz.

/s/ *Donna Wilson*
Notary Public

My commission expires: June 11, 1991

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STATE OF WYOMING,

Plaintiff

vs.

STATE OF OKLAHOMA,

Defendant

AFFIDAVIT OF RANDOLPH WOOD

I, Randolph Wood, being first duly sworn, state as follows:

1. I am the Director of the Wyoming Department of Environmental Quality. In that capacity I oversee programs for permitting coal mines. Under my direction the Air Quality Division and the Land Quality Division maintain statistics on the permitted capacity of coal mines in Wyoming, with particular emphasis on the mines in the Powder River Basin.

2. As of 1987, there was over 318,000,000 tons per year of permitted capacity in coal mines in the Powder River Basin in Wyoming. By contrast, total production from all Wyoming coal mines in 1987 was 146,500,000. It is clear that significant surplus capacity exists in Wyoming's coal mining industry.

FURTHER AFFIANT SAITH NAUGHT.

/s/ *Randolph Wood*

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

The foregoing instrument was subscribed and sworn to before me this 27th day of September, 1988, by Randolph Wood.

/s/ *James S. Uzzell*
Notary Public

My Commission expires: June 23, 1991